APPENDIX

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APPENDIX A

Opinion and Order of the District Court (Reported at 128 F. Supp. 469):

This is an action brought by plaintiff, a negro woman, claiming damages for alleged violations of her civil rights. She alleges that a bus driver of defendant, acting under color of state law (Sections 1491 to 1496, Title 58, South Carolina Code of Laws, 1952), required her to sit in a seat and to use an exit on one of defendant's busses on which she was a passenger that had been reserved for the exclusive occupancy and use of persons of her race. Plaintiff claims that such action on the part of defendant's bus driver violated Sections 1981 and 1983, Title 42, U. S. Code, and that jurisdiction of her alleged claim is conferred on this court by Section 1343, Title 28, U. S. Code.

The Court has before it for consideration a motion by defendant to dismiss the action. While several grounds for dismissal have been stated, it is only necessary to consider one of them, namely, that the complaint fails to state a claim upon which relief can be granted.

It is conceded by plaintiff's counsel that plaintiff's only claimed injury was the requirement that she sit in a place and leave the bus by an exit provided therein for the exclusive use of passengers of her own race. Therefore, unless the South Carolina statute requiring separate facilities for the races in defendant's busses is unconstitutional, plaintiff has no claim against defendant. Plaintiff's contention is that the statutes deny her "equal protection of the laws" secured to her by the 14th Amendment. She bases this contention on the Supreme Court's decision in *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A. L. R. (2d) 1180, decided less than a year ago. An analysis of the opinion in that case shows that it is not applicable in the field of public transportation. There the Court said: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place". It has made no such holding in the field of public transportation. Besides, the Court rested its opinion in the *Brown case* almost exclusively upon sociological and psychological factors. It discussed such intangibles as oppor-

tunities to engage in discussions and to exchange views with students of a different race, and the supposed sociological effect which segregation might have on a negro child's motivation to learn. The whole basis of the decision is the claimed adverse effect which segregation has on the educational and mental development of negro children, or as otherwise stated, "the children of the minority group". Certainly, no such effect can be legitimately claimed in the field of bus transportation. One's education and personality is not developed on a city bus. To hold that the *Brown* decision extends to the field of public transportation would be an unwarranted enlargement of the doctrine announced in that decision and an unreasonable restriction on the police power of the State. This Court is still bound by the decision in *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, which holds that segregation in the field of public transportation is a valid exercise of State police power. Although the *Brown case* discredited some of the language used in *Plessy v. Ferguson*, the Court's holding in that case has not been overruled.

See *Lonesome v. Maxwell*, 123 F. Supp. 193, holding that the *Brown* decision has no application to public recreational facilities; and *Holmes v. City of Atlanta*, 124 F. Supp. 290, holding that the *Brown* decision has no application to public golf courses.

It is concluded that the complaint fails to state a claim upon which relief can be granted and that it should be dismissed. It is so

Ordered.

Columbia, South Carolina, February 16, 1955.

GEORGE BELL TIMMERMAN,
United States District Judge

APPENDIX B

Opinion of the Court of Appeals (Reported at 224 F. (2d) 752):

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

PER CURIAM:

This is an action for damages brought by a Negro woman against a bus company because the driver of the bus required her to change her seat in accordance with the segregation law of South Carolina applicable to motor vehicle carriers, South Carolina Code (1952) 58-1941-1946, which she claimed to be violative of her rights under the 14th Amendment to the Federal Constitution. There was no diversity of citizenship, and defendant challenged the jurisdiction of the court to entertain the action under the Civil Rights Acts, 42 U. S. C. 1981, 1983 and 28 U. S. C. 1343 (3). The trial judge, without discussing the question of jurisdiction, dismissed the case on the ground that state statutes complained of were valid under the decision of *Plessy v. Ferguson*, 163 U. S. 537. See *Flemming v. South Carolina Electric & Gas Co.*, 128 F. Supp. 469. The correctness of that ruling as well as the question of jurisdiction are presented by the appeal.

We do not think that the separate but equal doctrine of *Plessy v. Ferguson, supra*, can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers as being governed by the same principles as segregation in the public schools; and the recent decisions in *Brown v. Board of Education*, 347 U. S. 483 and *Bolling v. Sharpe*, 347 U. S. 497, which relate to public schools, leave no doubt that the separate but equal doctrine approved in *Plessy v. Ferguson* has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of *Henderson v. United States*, 339 U. S. 816, where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination. The argument that such segregation can be upheld as a proper exercise

of the state police power was answered in the case of *Dawson v. Mayor and City Council of Baltimore City*, 4 Cir. 220 F. (2d) 386, where with respect to segregation in recreational centers we said:

> "* * * it is obvious that racial segregation in recreational activities can no longer be sustained as a proper exercise of the police power of the State; for if that power cannot be invoked to sustain racial segregation in the schools, where attendance is compulsory and racial friction may be apprehended from the enforced commingling of the races it cannot be sustained with respect to public beach and bath-house facilities, the use of which is entirely optional."

We think that there can be no question as to the jurisdiction of the Court. Under 28 U. S. C. 1343 (3) the District Courts are given jurisdiction of actions to redress the deprivation, under color of any state law, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens. The equal protection of the laws is guaranteed by the Fourteenth Amendment to the Constitution and by 42 U. S. C. 1981, and liability for deprivation of such right is provided by 42 U. S. C. 1983. Plaintiff's contention is that the defendant corporation, acting under color of state law, denied plaintiff her rights as secured by the Constitution and statutes, in that its driver, acting in accordance with state law, enforced the state segregation statutes against her and required her to change her seat. It is argued that, since the driver is made a police officer of the state by sec. 58-1494 of the South Carolina Code, his action is not attributable to the defendant; but we think it clear that he was acting for the defendant in enforcing a statute which defendant itself was required by law to enforce. See Code 58-1941. He was thus not only acting for defendant, but also acting under color of state law.

The decision appealed from will be reversed and the case will be remanded for further proceedings not inconsistent herewith.

Reversed and Remanded.

(Argued June 21, 1955. Decided July 14, 1955.)

APPENDIX C

South Carolina Statutes in Question:

Code of laws of South Carolina, 1952

Title 58

MOTOR VEHICLE CARRIERS

ARTICLE 7

Segregation of Races

Sec. 58-1491. **Segregation required:**

All passenger motor vehicle carriers operating in this State shall separate the white and colored passengers in their motor buses and set apart and designate in each bus or other vehicle a portion thereof, or certain seats therein, to be occupied by colored passengers, any such carrier that shall fail, refuse, or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and, upon indictment and conviction, shall be fined not less than fifty dollars nor more than two hundred and fifty dollars for each offense.

Sec. 58-1492. **Discrimination in accommodations prohibited:**

Such carriers shall make no difference or discrimination in the quality or convenience of the accommodations provided for the two races under the provisions of Section 58-1491.

Sec. 58-1493. **Changing space assigned or requiring change of seats:**

The driver, operator, or other person in charge of any such motor vehicle shall at any time when it may be necessary or proper for the comfort and convenience of passengers so to do, change the designation so as to increase or decrease the amount of space or seats set apart for either race and may require any passenger to change his seat as it may be necessary or proper. But no contiguous seats on the same bench shall be occupied by white and colored persons at the same time. Any driver, operator or other person in charge of any such vehicle who shall fail or refuse to cary out the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense.

Sec. 58-1494. **Driver a special policeman:**

Each driver, operator or person in charge of any such vehicle, in the employment of any company operating it, while actively engaged in the operation of such vehicle, shall be a special policeman and have all the powers of a conservator of the peace in the enforcement of the provisions of this article and in the discharge of his duty as such special policeman in the enforcement of order upon such vehicle. Such driver, operator or person in charge of such vehicle shall likewise have the powers of a conservator of the peace and of a special policeman while in pursuit of persons for disorder upon such vehicles or for violating the provisions of this article and until such persons as may be arrested by him shall have been placed in confinement or delivered over to the custody of some other conservator of the peace or police officer. Acting in good faith, he shall be for the purposes of this article the judge of the race of each passenger whenever such passenger has failed to disclose his race.

Sec. 58-1495. **Violations of article by passengers:**

All persons who fail while on any motor vehicle carrier to take and occupy the seat or seats or other space assigned to them by the driver, operator or other person in charge of such vehicle or by the person whose duty it is to take up tickets or collect fares from passengers therein or who fail to obey the directions of any such driver, operator or other person in charge as aforesaid to change their seats from time to time as occasions may require, pursuant to any lawful rule, regulation or custom in force by such lines as to assigning separate seats or other space to white and colored persons, respectively, having been first advised of the fact of such regulation and requested to conform thereto, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars for each offense.

Sec. 58-1496. **Ejection of such passengers:**

Any person who shall violate any of the provisions of Section 58-1495 may be ejected from any such vehicle by any driver, operator or person in charge of such vehicle or by any police officer or other conservator of the peace

and, if any such person ejected shall
upon such vehicle, he shall not be ent
of any part of it. For the refusal of a
to abide by the request of the person i
hicle, as aforesaid, and his consequent
vehicle, neither the driver, operator,
owner, manager, or bus company operati
be liable for damages in any court.

APPENDIX D

Federal Statutes Involved:

Title 42, Sec. 1981 Equal rights under t

All persons within the jurisdiction o
shall have the same right in every Stat
make and enforce contracts, to sue, be
dence, and to the full and equal benef
proceedings for the security of persons
enjoyed by white citizens, and shall be s
ishment, pains, penalties, taxes, licenses
every kind, and to no other, R. S. Sec. 1
Title 42, Sec. 1983 Civil action for depri

Every person who, under color of
nance, regulation, custom, or usage, of a
tory subjects, or causes to be subjected,
United States or other person within the
of to the deprivation of any rights, pri
nities secured by the Constitution and la
to the party injured in an action at law
other proper proceeding for redress. R.
Title 28, Sec. 1343 (3) Civil rights.

The district courts shall have origin
any civil action authorized by law to be c
person: • • •

(3) To redress the deprivation, un
State law, statute, ordinance, regulation,
of any right, privilege or immunity secu
tution of the United States or by any Act
viding for equal rights of citizens or of
the jurisdiction of the United States.
646, 62 Stat. 932.

FILED
DEC 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 511

SOUTH CAROLINA ELECTRIC AND GAS COMPANY,
a corporation,

Appellant,

v.

SARAH MAE FLEMMING,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

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IN THE

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October Term, 1955

No. 511

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SARAH MAE FLEMMING,

Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves that the judgment and decree of the Court of Appeals be affirmed on the ground that the questions raised in this appeal are without substance in law or fact and that the judgment of the court below is clearly correct and in accord with the decisions of this Court.

Statement

On June 22, 1954, appellee, an American citizen of Negro origin, boarded a bus owned by appellant, a public service carrier engaged in the business of passenger transportation within the City of Columbia, South Carolina, pursuant to franchise or certificate of public convenience. The

bus, like others in appellant's fleet, had an exit at the front and rear, a long vertical seat on either side of the aisle, followed by several rows of horizontal seats and a long back seat at the rear extending across the entire width of the bus.

Title 58, Sections 58-1491-58-1493, Code of Laws of South Carolina, 1952, makes segregation of the races on motor vehicle carriers mandatory. Under Section 58-1491 failure by the carrier to enforce segregation in its vehicles constitutes a misdemeanor, rendering the carrier subject to penalties up to $250 for each offense. Under Section 58-1493 a bus driver may be charged with a misdemeanor for failure to enforce segregation and fined up to $25 for each offense. Section 58-1495 subjects passengers to fines not in excess of $25 for violations of the state's policy, and Section 58-1496 empowers the bus driver to eject passengers from the bus who refuse to comply with the carrier's regulations designed to enforce racial segregation and protects the driver and carrier from suit for damages resulting from such ejection.

Section 58-1493 empowers the bus driver to change the designation of space "so as to increase or decrease the amount of space or seats set apart for either race . . . But no contiguous seats on the same bench shall be occupied by white and colored persons at the same time." Under Section 58-1494 a "driver, operator or person in charge of any such vehicle, in the employment of any company operating it, while actively engaged in the operation of such vehicle, shall be a special policeman and have all the powers of a conservator of the peace in the enforcement of the provisions of this article and in the discharge of his duty as such special policeman in the enforcement of order upon such vehicle."

To comply with these provisions appellant has adopted and enforces a policy, custom, rule, regulation or practice

pursuant to which white persons are seated from the front to rear of its buses and Negro passengers from rear to front. This policy, custom, rule, regulation or practice, adopted and enforced under color of state law, makes it unlawful for a Negro to occupy a seat in appellant's bus in front of or beside a white person, and conversely it is unlawful for any white person to occupy a seat in back of or beside a Negro.

When appellee boarded the bus in question, white persons were sitting in the forward section of the bus. Pursuant to appellant's policy that section of the bus thereby became the "white" section, and all Negro passengers had to take seats in back of those occupied by white persons. All seats to the rear of those occupied by white persons became the "colored" section and were all occupied, and many Negro passengers were standing when appellee boarded the bus. Because of the crowded condition of the bus, appellee stood in the forward or "white" section of the bus. Thereafter, a white passenger left the bus, and appellee took the seat vacated which resulted in her sitting in front of one or two white passengers, and the altercation resulting in the instant lawsuit ensued.

The bus driver in a loud and threatening tone ordered appellee to get up from the seat she had taken. She did not obey at once, and he repeated his order. In fear of further humiliation and possible bodily harm appellee left the disputed seat and prepared to leave the bus by the front exit, although as yet some distance from her desired destination. The driver permitted white passengers to use this exit but ordered appellee to leave by the rear door, and he struck her to enforce his command.

Appellee, having suffered physical injury, humiliation and embarrassment resulting from the state's policy, commenced the instant litigation, an action for damages, in

the district court on the ground that the South Carolina statutes requiring racial segregation on intrastate motor vehicle carriers are unconstitutional and void, and that appellant's enforcement of the state's unconstitutional policy violated appellee's rights under the Fourteenth Amendment. The district court held that *Plessy* v. *Ferguson*, 163 U. S. 537, was controlling and granted appellant's motion to dismiss on the merits. Its decision is reported at 128 F. Supp. 469. The Court of Appeals reversed on the ground that the state's policy is unconstitutional in that the "separate but equal" doctrine of *Plessy* v. *Ferguson* was no longer a correct statement of the law and could not be applied to intrastate commerce. It is reported at 224 F. 2d 752. This appeal followed.

Statutes

Appellant in its jurisdictional statement has set forth some of the statutory law which should be considered in connection with this appeal. In addition to the statutes cited by appellant the following statutes are evidence of the control the state exercises over appellant's operation, and are, therefore, important to the disposition of this appeal:

§ 58-1402. Transportation by motor vehicle for compensation regulated.

> No corporation or person, their lessees, trustees or receivers, shall operate any motor vehicle for the transportation of persons or property for compensation on any improved public highway in this State except in accordance with the provisions of this chapter and any such operation shall be subject to control, supervision and regulation by the Commission in the manner provided by this chapter.

§ 58-1403. Certificate and payment of fee required.

No motor vehicle carrier shall hereafter operate for the transportation of persons or property for compensation on any improved public highway in this State without first having obtained from the Commission, under the provisions of article 2 of this chapter, a certificate and paid the license fee required by article 3.

§ 58-1406. Penalties.

Every officer, agent or employee of any corporation and every other person who wilfully violates or fails to comply with, or who procures, aids or abets in the violation of, any provision of articles 1 to 6 of this chapter or who fails to obey, observe or comply with any lawful order, decision, rule, regulation, direction, demand or requirement of the Commission or any part or provision thereof shall be guilty of a misdemeanor and punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars or imprisonment for not less than ten days nor more than thirty days.

§ 58-1422. Revocation, etc., of certificates; appeal.

The Commission may, at any time, by its order, duly entered, after a hearing had upon notice to the holder of any certificate hereunder at which such holder shall have had an opportunity to be heard and at which time it shall be proved that such holder has wilfully made any misrepresentation of a material fact in obtaining his certificate or wilfully violated or refused to observe the laws of this State touching motor vehicle carriers or any of the terms of his certificate or of the Commission's proper orders, rules or regulations, suspend, revoke, alter or amend any certificate issued under the provisions

of articles 1 to 6 of this chapter. But the holder of such certificate shall have the right of appeal to any court of competent jurisdiction.

§ 58-1461. Commission to supervise carriers; rates.

The Commission shall supervise and regulate every motor carrier in this State and fix or approve the rates, fares, charges, classification and rules and regulations pertaining thereto of each such motor carrier. The rates now obtaining for the respective motor carriers shall remain in effect until such time when, pursuant to complaint and proper hearing, the Commission shall have determined that such rates are unreasonable.

Argument

1. There can no longer be doubt that the "separate but equal" doctrine of *Plessy* v. *Ferguson*, pursuant to which states have enforced and maintained racial segregation and discrimination in both public and private institutions, is no longer a reliable yardstick to determine whether a state has met its obligations under the Fourteenth Amendment to the Constitution of the United States. It must be conceded, of course, that this Court has not expressly rejected the application of *Plessy* v. *Ferguson* to intrastate commerce. On the other hand, the "separate but equal" doctrine has been steadily restricted and expressly repudiated in other areas, and these decisions indicate, we submit, that the *Plessy* decision is no longer controlling, *Brown* v. *Board of Education*, 347 U. S. 483; *Bolling* v. *Sharpe*, 347 U. S. 497 (public education); *Buchanan* v. *Warley*, 245 U. S. 60; *Shelley* v. *Kraemer*, 334 U. S. 1 (housing); *Dawson* v. *Mayor*, — U. S. —, and *Holmes* v. *City of Atlanta*, — U. S. —, decided November 7, 1955 (public recreational facilities and activities). Further,

Morgan v. *Virginia*, 328 U. S. 374 (which invalidated the application of state laws requiring segregation to interstate commerce) and *Henderson* v. *United States*, 339 U. S. 816 (which states in effect, if not in terms, that enforcement of the "separate but equal" doctrine constitutes a forbidden discrimination under the Interstate Commerce Act)[1] cast serious doubt on the doctrine's validity in intrastate commerce.[2] No valid reason exists, we submit, which warrants maintenance of "separate but equal" in intrastate commerce when it has been abandoned in other areas

The truth of the matter is that the "separate but equal" doctrine has been riddled unto death. It is at war with the Court's present, interpretation of the Fourteenth Amendment, and all its rationale has been rejected by this Court. No longer will a mere showing that equal facilities are made available to the Negro group suffice to sustain a racial classification as was the case when the *Plessy* doctrine was considered controlling. For this Court has now taken the position that racial classifications are suspect and must be subjected to the most careful scrutiny. See *Bolling* v. *Sharpe*, *supra*, where the Court said at pages 499, 500:

> Classifications based solely upon race must be scrutinized with particular care, since they are con-

[1] Title 49, United States Code, Section 3(1).

[2] The doctrine was dealt another blow in *National Association for the Advancement of Colored People* v. *St. Louis-San Francisco Ry. Co.*, — I. C. C. —, and *Keyes* v. *Carolina Coach Co.*, — I. C. C. —, decided November 7, 1955, by the Interstate Commerce Commission, in which the Commission found that segregation in interstate railroad coaches, buses and station waiting rooms constitutes an undue prejudice and disadvantage in violation of the Interstate Commerce Act (Title 49, United States Code, Section 3(1)) and the Motor Carriers Act (Title 49, United States Code, Section 316(d)), even though "separate but equal" facilities are provided for Negro passengers.

trary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle "that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race." And in *Buchanan* v. *Warley*, 245 U. S. 60 . . . the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. . . .

Nor is the police power argument relied upon by the Court in 1896 persuasive today. See *Buchanan* v. *Warley, supra; Morgan* v. *Virginia, supra.* As the Court of Appeals for the Fourth Circuit said in *Dawson* v. *Mayor, supra,* 220 F. 2d 386, 387, "segregation cannot be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race are equal to those furnished the other."

Moreover, the great body of legal authority cited to support the decision reached in the *Plessy* case were lower state and federal decisions upholding segregation in the public schools. These authorities were repudiated in *Brown* v. *Board of Education, supra,* and *Bolling* v. *Sharpe, supra.*

The "separate but equal" doctrine h rejected in all material respects. All that remains formality of expressly overruling *Plessy* v. *Ferguso* e field of intrastate commerce, the only area wher 'separate but equal" doctrine has been applied by urt. We respectfully urge the Court to take this unity to overrule the *Plessy* case and thereby gra trouble-some concept a final repose.

2. *Henderson* v. *United States, supra* racial segregation in transportation is a crimination forbidden under Section 3(1) Commerce Act. Undue prejudice and dis hibited under Section 3(1) of the Act has same meaning by this Court as the Fou ment's mandate of equal protection of the ample, compare the statement in *Sweatt* U. S. 629, 635, that rights under the Fou ment are personal and present with that *United States,* 313 U. S. 88, 97, concernin character of rights under Section 3(1) of Commerce Act; and compare the statemer *Kraemer,* 334 U. S. 1, 22, that indiscrimin tion is not equality under the Fourteenth A a similar pronouncement in *Henderson* v. *supra,* at 825, concerning equality under Commerce Act.

osts that ated dis- nterstate age pro- iven the Amend- For ex- ter, 339 Amend- tchell v. ersonal erstate helley v. crimina- ent with *States,* nterstate

In the *Henderson* case, the Court struc rier regulation pursuant to which a table fo was permanently reserved in the carrier's the exclusive use of Negro passengers, while tables were reserved exclusively for white Court found the regulation invalid as it d the possibility that a Negro might be denied the table reserved for Negroes was in use, vacancies in the other part of the dining c said on this point at pages 824, 825:

a car- persons car for maining s. The prevent e where re were e Court

> The right to be free from unreasonable discriminations belongs, under § 3(1), to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied facilities. The rules impose a like deprivation upon white passengers whenever more than 40 of them seek to be served at the same time and the table reserved for Negroes is vacant.

Under the *Henderson* formula, it is impossible to maintain segregation in railway dining cars or in any area of limited space, because no regulation requiring racial segregation can avoid the possibility that a member of the segregated group may be denied service or the use of the facility in question, where space may be available in that portion of the facilities barred to members of his racial group.

Application of that reasoning to the instant case would necessarily condemn the state law here involved. Under South Carolina law no Negro or white person may occupy contiguous space on the same seat on appellant's buses. To comply with these requirements appellant enforces regulations which seat white persons front to rear and

Negro passengers rear to front, and no Negro may sit beside or in front of a white person. Thus, a situation must necessarily occur, as in the instant case, when a seat is available beside or in front of a white person, and a Negro passenger must remain standing because all seats which the regulations permit him to occupy are filled.[3]

3. That federal jurisdiction exists is clear. Appellee alleged in her complaint that her action arose under the fourteenth Amendment and under Title 42, United States Code, Sections 1981 and 1983 and invoked federal jurisdiction under Title 28, United States Code, Section 1343 (3). Appellee's basic contention is that Title 58, Section 58-1491 to 58-1496, inclusive, Code of Laws of South Carolina, 1952, set out in Appendix C to appellant's jurisdictional statement makes the carrier a state instrumentality for the enforcement of the state's policy of segregation on appellant's buses. Further, Sections 58-1402, 58-1403, 58-1406, 58-1422, 15-1461 (cited *supra* at pages 4-6) clearly demonstrate that, insofar as enforcement of racial segregation is concerned, the carrier must enforce the state's policy or risk

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[3] It is also of interest that the Interstate Commerce Commission in the two cases decided on November 7th past, cited *ante*, which held that the Interstate Commerce Act bars segregation in interstate railway coaches, buses and waiting rooms, even though equal facilities are provided, quotes the following language appearing at page 825 in the *Henderson* case in support of its conclusion that segregation is a prohibited discrimination under the Interstate Commerce Act:

> We need not multiply instances in which these rules sanction unreasonable discriminations. The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility.

loss of its right to operate its business within the state. Unquestionably, appellant was acting under color of law in promulgating and enforcing regulations designed to accomplish on its buses the racial segregation required by state law. Both bus driver and the carrier became the state's instruments for the purpose of effecting its policy.

Neither *Picking* v. *Penn R. R. Co.*, 151 F. 2d 240 (CA 3d 1945), nor *Moore* v. *Atlantic Coast Line R. Co.*, 98 F. Supp. 375 (E. D. Pa. 1951), is contrary or in conflict with the decision below in this case. Apparently, the reason for their citation is the suggestion in both cases that employees of private corporations engaged in passenger transportation could not be held to act under color of law without a showing that they conspired with state officials or purported to act as state officials. As a general statement, this may well be true, but there was no showing in either case cited of a statutory scheme which empowered and required the carrier to enforce the state's policy. Such is the situation here. The state requires that intrastate motor vehicle carriers maintain and enforce segregation in the operation of their vehicles. The state's policy could not be enforced in the abstract, and it delegated to the carrier the authority to promulgate and enforce regulations that would effectuate the statutory policy. For that purpose, therefore, the carrier necessarily became a state instrumentality, and as such its action is within the reach of the Fourteenth Amendment.

Conclusion

Wherefore, for the reasons hereinabove indicated, it is respectfully submitted, the judgment of the Court of Appeals is correct and this motion to affirm should be granted.

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 511

SOUTH CAROLINA ELECTRIC AND GAS COMPANY,
A CORPORATION, APPELLANT,

versus

SARAH MAE FLEMMING, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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BRIEF IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

Appellee has made misstatements of material facts in the "Statement" introducing her Motion to Affirm. The importance of these facts requires that the misstatements be identified.

At the bottom of page 2, and at the top of page 3 of her motion Appellee states that Appellant "has adopted and enforces a policy, custom, rule, regulation or practice" designed to "comply" with segregation statutes of South Carolina. Further at the second paragraph on page 3 Appellee states that pursuant to the "policy" mentioned, the Appellant divided its bus into a "white section" in the front and a "colored section" in the rear.

Appellee has gone outside the record and beyond the allegations of the pleadings in making these statements.

They are not only not in the record, but they are not true. Appellant does not divide its buses into sections, nor does it enforce any "policy, custom, rule, regulation or practice" as stated.

The Complaint alleges that the acts complained of were those of the bus driver in the enforcement of the segregation laws. The statute makes him a special policemen for that purpose. No other act or conspiracy to act by Appellant is alleged, nor was there in fact any additional act.

Similar mis-statements were made in briefs submitted by Appellee to the Court of Appeals. These were called to the attention of the Court and to the attention of Counsel. The mis-statements here cast Appellant in an unfavorable light. Their purpose is not merely to excite sympathy, because they are couched in almost the exact language of Title 42, U. S. Code, section 1983[1]. The obvious reason is to characterize Appellant's acts as those inhibited by the Civil Rights Act in the mind of this Court; altough not supported by pleaded or actual fact.

ARGUMENT

Appellee's Motion to Affirm makes two arguments. One is at length: That *Plessy v. Ferguson*, 163 U. S. 537, has been repudiated by this Court and should be overruled. One is very brief: That the District Court has jurisdiction.

1. While Appellee and her counsel are really interested in only the constitutional question, Appellant respectfully submits that it should never have been reached in this case. The District Court (See p. 13 of Jurisdictional Statement)

---

[1] Title 42, Sec. 1983, Civil action for deprivation of rights.
Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

did not find a discussion of the jurisdict[ion] essary as it relied upon *Plessy*. The Cou[rt] p. 16 of Jurisdictional Statement) foun[d] cause section 58-1491 of the South Caroli[na] defendant itself" to enforce the segrega[tion]

It is respectfully submitted that this [Court] isdiction is wrong. No matter what the [Court] decision of the Court of Appeals should b[e] Complaint dismissed.

Appellee's counsel have recognized [that] the slender jurisdictional reed upon whic[h] Courts below, and again in their Motion t[o] to shore up the argument that the Ap[pellee] merely the bus driver) acted "under colo[r] ing that the various laws governing the o[peration] utilities in effect make Appellant an a[gent] Appellant's acts then, arguendo, becom[e] within the meaning of the Civil Rights A[ct] teenth Amendment. *Hardyman v. Collins* S. Ct. 937, 95 L. Ed. 1258; *Shelley v. Kra* 68 S. Ct. 836, 92 L. Ed. 1161; *Bowman v C* U. S. 611, 6 S. Ct. 192, 29 L. Ed. 502; *U.* 92 U. S. 542, 23 L. Ed. 588.

Appellee cites no authority for her [assertion] public utilities are agents of the State, [because] none. By her definition every business [affected] ernmental authority would be an agent [of the] ernment within the meaning of the F[ourteen]ment. Having no authority for this asto[unding] she includes sections 58-1402, 58-1403, 58-[1422,] 58-1461 of the South Carolina Code, 1952 [Motion to] Affirm, arguing that they so control Ap[pellee] it an agent of the State. Reading the s[ections] examination of the footnotes printed wi[th] show that these sections **do not even ap**[ply to] Appellant's

bus system. See, *City of Columbia v. Pearman*, 180 S. C. 296, 185 S. E. 747 (1936); *State ex rel. Daniel v. Broad River Power Co.*, 157 S. C. 1, 153 S. E. 537 (1929), and *City of Columbia v. Tatum*, 174 S. C. 366, 177 S. E. 541 (1934).

As the Court of Appeals noted, if "state action" by Appellant is found it must be found in the segregation statutes here being attacked, Sections 58-1491 through 58-1496, South Carolina Code, 1952 (See pp. 17-18 of Jurisdictional Statement). Appellant is not an agent of the State merely because it is a public utility; nor is there any question of a conspiracy with state officials as in *Picking v. Pennsylvania R. R. Co.*, 151 F. (2d) 240 (C. A. 3, 1945).

The general rule of law is that the master is not liable for the acts of the servant, who is also a special policeman by statute, when the servant is engaged in discharging his statutory duty. See ALI, Restatement of Agency, Sections 217 (a) and 245 (f); 39 Corpus Juris 1273; Labatt, Master and Servant, Vol. 6, P. 7535; 35 A. L. R. 681; *Redgate v. Southern Pacific*, 24 Cal. 573, 141 Pac. 1191; *Houston v. Minneapolis R. Co.*, 25 N. D. 469, 141 N. W. 995. This common-law rule is reinforced by the express terms of the statutes here involved. Section 58-1496 specifically exempts Appellant from liability for acts resulting from attempts to enforce the statutes.

To skirt the obvious effect of this rule of the law of agency, and to satisfy the decisions of the courts as to what constitutes action "under color of law", the Court must find in the South Carolina statute language that makes Appellant an agent of the state. It must then go farther and find in the case actions by Appellant as a state agency resulting in damage to Appellee. The question then is: Does section 58-1491 make Appellant liable, under the Civil Rights Act, for the acts of its driver in enforcement of the

statute? The Court of Appeals so held, and that holding should be reversed.

The pertinent part of the section provides:

> "All passenger motor vehicle carriers operating in this State shall separate the white and colored passengers in their motor buses and set apart and designate in each bus or other vehicle a portion thereof, or certain seats therein, to be occupied by colored passengers, any such carrier that shall fail, refuse, etc. (providing penalty)."

The whole relationship between Appellant and the State, in respect to this case, is contained in this provision. Does it make Appellant an enforcement agency? Does it make Appellant a state officer or agent? It does not in terms, and it certainly should not be done by inference. The subsequent sections place the enforcement squarely upon the driver and make him a special policeman for the purpose. They specifically do not make the bus company the enforcing agency.

Section 58-1491 is obviously directive of the carrier's obligation to the State, and not the delegation of a State function to the carrier. The simple proof is that Section 58-1491 may stand by itself. It and the subsequent sections are not interdependent. Even if Appellant went so far as to label seats for whites and negroes, or painted a line dividing the bus, these acts could not cause the Appellee the injury complained of. Her complaint is not that seats were designated or that the races were separated, but that the Appellant deprived her of rights, privileges and immunities secured by the Constitution by the driver attempting to **enforce** the duties placed on him by the segregation laws.

If the opinion of the Court of Appeals is sound, then there is no distinction between law enforcement and simple observance of regulatory statutes. If one infers an agency obligation from Section 58-1491, the inference is immedi-

ately contradicted by the plain language of the following sections. The very next section: 58-1492 provides:

> "Such carriers shall make no difference or discrimination in the quality or convenience of the accommodations provided for the two races under the provisions of Section 58-1491."

making plain the carrier's function is to provide accomodations. Then Sections 58-1493 and 58-1494 delegate enforcement to the driver.

Another dangerous result lurks in this case, lost in the segregation shadows. That is the opening of the door to a flood of Civil Rights litigation against private parties on the theory that directive or regulatory legislation makes them agents of the State. For example, the laws of many States provide that carriers shall maintain order on their trains and buses, a directory statute. Some of these statutes make the conductor or driver a special policeman. Some do not. If Appellee were ejected from a train in North Dakota in the most high-handed, disgraceful, and unconstitutional manner would she have a right of action under the Civil Rights Act against the carrier, on the theory that it was acting as an agency of the State of North Dakota "under color of law"? It seems clear she would not. *Houston v. Minneapolis R. Co.*, 25 N. D. 469, 141 N. W. 995. *Picking v. Pensylvania R. Co.* (C. A. 3, 1945), 151 F. (2d) 240; *Moore v. Atlantic Coast Line* (D. C. Pa., 1951), 98 F. Supp. 375.

The majority of Civil Rights actions are not brought complaining of unconstitutional laws, of course, but complaining of unconstitutional use of valid laws. If every directory or regulatory statute makes the private person a state agent upon compliance with its terms, whether or not *Plessy* is overruled, the decision of the Court below opens wide the definition of conduct proscribed by the Civil Rights Act. The decision runs counter to the unvary-

ing interpretation which the courts have given to the civil rights statutes since the earliest cases. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of law' within the statute." This interpretation is consistent from *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 down to date, *Williams v. U. S.*, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774.

Appellant respectfully submits the decision of the Court of Appeals was erroneous and should be reversed.

---

2. If the constitutional issue is reached, should *Plessy v. Ferguson* be overruled? Appellant submits it should not.

The Court of Appeals states in its decision that "the separate but equal doctrine approved in *Plessy v. Ferguson* has been repudiated." (See p. 15 of Jurisdictional Statement). The Appellee's argument on her Motion to Affirm consists chiefly of a listing of the cases which have whittled away application of the *Plessy* doctrine in various fields, coupled with a plea that this Court finally dispatch *Plessy* in its entirety.

If, as argued, *Plessy* has been entirely repudiated, why has not the Court overruled it in terms? This has been the goal of Appellee's counsel for many years. The opportunities before the Court have been frequent. It is respectfully submitted that judicial self-restraint could not be the sole answer. Appellant ventures the opinion that there are good and valid constitutional and practical grounds upon which *Plessy* has been and should be preserved.

First, there is the honored tradition of the Court that it does not decide issues in a metaphysical vacuum. Even if time has rendered invalid the rationale of the "separate but equal" doctrine in public schools, and other areas where public funds provide public facilities, yet time has

not obliterated race conflict. The deliberateness of the Court in dealing with the problem illustrates its understanding of this. Appellant submits that nowhere is moderation more indicated than in the field of intrastate and local transportation involving a high volume of traffic in a limited space. It is not simply a matter of ruling that there must be no discrimination in facilities, or in opportunities for education or recreation, or in dispensing the tax dollar. Adult whites and negroes are forced together, with their adult prejudices and resentments. Counsel for Appellee aptly quoted from Myrdal, American Dilemma 635, in their brief on appeal below: "As such, segregation on buses and street cars is bitterly resented by Negroes as a badge of inferiority." Only the observance of long-standing custom, supported by the driver's authority to require separation of the recalcitrants, has kept the public peace. Inconvenience for both white and colored is sometimes encountered; but inconvenience and resentment are the result of many laws. They do not constitute discrimination within the prohibition of the 14th Amendment merely because they are resented or inconvenient. Resentment and inconvenience are small prices to pay for peace and good order.

Second, the easy answer that the "police power" argument has been disposed of by *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149; *Morgan v. Virginia*, 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317, does not bear scrutiny In *Buchanan* the invalid ordinance deprived citizens of property rights expressly protected by the language of the Amendment. The succinct language of Mr. Justice Day was:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

The decision expressly did not hold that no classification by race could be valid, or that all legislation designed to preserve the peace by separating the races results *per se* in an unconstitutional deprivation, any more than did this Court in *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693, or the Court of Appeals in *Dawson v. Mayor* (C. A. 4), 220 F. (2d) 386; affirmed by this Court on November 7, 1955. Appellee, realizing the need to bring herself within *Buchanan's* rule, argued below that the South Carolina statutes deprived her of "freedom of locomotion" and that this was a freedom or liberty protected to her by the 14th Amendment. It appears that this characterization has been abandoned here, but she argues that her liberty generally is inhibited if she cannot sit on any seat in Appellant's bus. She relies extensively in her Motion upon the arguments in *Morgan v. Virginia, supra*, and *Henderson v. U. S.*, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1277, that segregation practices place unreasonable burdens upon interstate commerce. Neither of these decisions hold, of course, that all segregation is proscribed by the 14th Amendment.

We come then to the ultimate constitutional question. It is not whether the 14th Amendment guarantees Appellee the license to sit anywhere in a bus. It is whether the South Carolina statutes requiring segregation in intrastate buses deprive citizens of their constitutional rights by **unreasonably restricting** their liberty without a proper governmental objective. *Bolling v. Sharpe, supra; Buchanan v. Warley, supra.*

Appellant unhesitatingly avers that the serious problem of race hostility requires maintenance of segregation in the close quarters of its buses, perhaps now more than before. There is no distinction in facilities or service involved. There is no problem of equal opportunities for races, or discrimination in use of public funds or property, involved. Unquestionably the free flow of traffic in Appel-

lant's bus system is aided by this simple means of preserving racial tranquility. In the final analysis, each case must turn on its own facts, in determining whether the means adopted "reasonably tend to accomplish a lawful purpose," *Buchanan v. Warley*, 245 U. S. at p. 63. Appellant respectfully submits that no reasonable person living in the area where it operates can doubt that these segregation statutes are needed, especially at this time, and reasonably accomplish the preservation of the public peace with the minimum restriction upon the liberty of all.

As the Court held in *Korematsu v. U. S.*, 323 U. S. 214, 65 S. C. 193, 89 L. Ed. 194, the propriety of the restriction upon the liberty of the individual is dictated in great degree by the exigencies of the situation. A complete overruling of *Plessy v. Ferguson* may never be desirable in the abstract sense of depriving the States of reasonable right to classify by race alone for a proper governmental purpose.

CONCLUSION

For the reasons herein stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the Complaint herein be dismissed.

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December 27, 1955.

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No. 511

SOUTH CAROLINA ELECTRIC & GAS COMPANY,
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versus

SARAH MAE FLEMMING, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE CITY OF COLUMBIA, S. C. AMICUS CURIAE

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versus

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE CITY OF COLUMBIA, S. C. AS AMICUS CURIAE, OPPOSING MOTION TO AFFIRM

STATEMENT

This brief in behalf of the City of Columbia, South Carolina, as an *amicus curiae*, in opposition to Appellee's Motion to Affirm in this cause, is filed under the provisions of Rule 42(4) of the Revised Rules of this Court.

ARGUMENT

The City of Columbia, S. C., in which Appellant's local bus transportation system operates, and where the incident complained of by Appellee occurred, is directly involved and interested in the result of this case as it affects segregation of the races on buses within the city.

In this city of some 100,000 people the motor bus systems are the only mode of local public transportation other than taxicabs. Consequently the buses carry a large part of the population daily. The number of negro passengers is almost equal to the white. The growth of the city in recent years has intensified rather than diminished the necessity for orderly handling of the race problem. The city has employed negro police officers, for example, as a partial solution to some of the problems encountered.

There is no question that the South Carolina statutes under attack in this case, requiring segregation of the races in the local buses, are necessary. A local ordinance to that effect would necessarily have been enacted many years ago had there been no State statute. The city police court docket shows that there have been less than a half-dozen cases per year made for refusal to obey segregation laws or for racial disorder on the buses in this city. The reason is the observance of the segregation statutes and the compliance by the passengers with the driver's directions. The passengers, with their prejudices and resentments, are not left to settle their differences among themselves.

This case is not a matter of discrimination in facilities, as in the case of various interstate commerce cases considered by this Court. This case does not involve any discrimination in opportunities, in use of public institutions, or in use of public properties or funds. It is a simple restriction on the license of all, negro and white, with the object of promoting public peace and welfare. It is the em-

ployment of the plainly proper method of preserving order by separating the antagonistic. If we read the law correctly, the propriety and reasonableness of every statute is dependent upon the individual situation. It is abundantly plain in this city that these local segregation statutes are reasonable and necessary at this time and should not be declared invalid.

Appellee's attorneys state that negroes resent bus segregation as a "symbol" of inferiority. That announced resentment is one of the exact reasons why the statutes are necessary. This city earnestly urges this Court that it not banish harmony and good order among the great majority of the people, merely to satisfy the desire of some to banish a "symbol".

For these reasons, and for those stated by the Attorney General therein, the City of Columbia joins in the brief submitted in behalf of the State of South Carolina as an *amicus curiae* in this case; and urges that this Court not overrule the doctrine of *Plessy v. Ferguson*, 163 U. S. 537, so far as it permits reasonable segregation of the races, without distinction in accommodations or facilities, with the objective of promoting peace, harmony, and the general welfare.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the Complaint be dismissed.

Respectfully submitted,

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December 31, 1955.

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Supreme Court of the Un States

OCTOBER TERM, 1955

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SOUTH CAROLINA ELECTRIC AND (OMPANY,
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BRIEF OF THE STATE OF SOUTH OLINA
AMICUS CURIAE
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A CORPORATION, APPELLANT

versus

SARAH MAE FLEMMING, APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE STATE OF SOUTH CAROLINA AMICUS CURIAE IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

By this action the plaintiff-appellee, a Negro woman, seeks damages from the corporate defendant-appellant in the United States Court for the Eastern District of South Carolina, for an alleged violation of her civil rights, the Appellee purporting to bring the action under the authority of Sections 1981 and 1983, Title 42 of the United States Code. Jurisdiction of the District Court is purportedly

founded under the provisions of Section 1343 (3), Title 28, United States Code.

The history of this action is contained in the Appellant's Jurisdictional Statement (pages 3 through 5) and will not be repeated herein.

In Appellee's Motion to Affirm, the greater portion of the argument is directed to the contention that the case of *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, decided by this Court in 1896, is no longer applicable, and Appellee asks this Court, by its action, to summarily overrule this case.

Because of the importance of the question of separation of the races in public intrastate transportation as it exists in the State of South Carolina, and because of the grave implications of a ruling upsetting the *Plessy v. Ferguson case*, the State of South Carolina, through its Attorney General, feels the necessity of filing this Brief *amicus curiae* in opposition to Appellee's Motion to Affirm.

In the argument which follows, this Brief will be confined to the question of whether or not the *Plessy v. Ferguson case* has been overruled and whether or not the said case should be overruled by this Court.

ARGUMENT

In the beginning of Appellee's argument, the statement is made that "there can no longer be doubt that the 'separate but equal' doctrine of *Plessy v. Ferguson*, pursuant to which states have enforced and maintained racial segregation and discrimination in both public and private institutions, is no longer a reliable yardstick to determine whether a state has met its obligations under the Fourteenth Amendment to the Constitution of the United States." (page 6.) Following this statement, Appellee states that "the truth of the matter is that the 'separate

but equal' doctrine has been riddled unto death." (page 7.) In reality, neither of these statements is correct.

The cases of *Brown v. Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A. L. R. (2d) 1180, and *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884, dealt solely and exclusively with the question of public education and, although this court had the opportunity at the time to completely overrule the case of *Plessy v. Ferguson*, it, nevertheless, did not see fit to do so.

In the case of *Brown v. Board of Education, supra*, the Court stated:

> "We conclude that in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Throughout the decree of the Court, it refers to the question of the "separate but equal" doctrine announced in *Plessy v. Ferguson, supra*, and mentions the fact that it had been recognized by the Court and followed by the Court in cases regarding the field of public education and that it had not been overruled, the Court stating: "In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff."

And in *Bolling v. Sharpe, supra*, the Court recognized that there were some instances where separation of the races might still be necessary since it stated that "classifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect."

While we cannot agree with the Court in the statement that separation of races is "contrary to our traditions",

nevertheless, we feel that the Court recognized that there will still be areas in which separation of the races for certain purposes would not only be desirable but necessary, and it is respectfully submitted that in the field of public intrastate transportation, separation of the races is necessary.

The argument by appellee that the police power argument is not persuasive today is entirely rediculous and false. For her support of such statement, appellee cites the cases of *Buchanan v. Warley,* 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149, and *Morgan v. Virginia,* 328 U. S. 373, 66 S. Ct. 1050, 90 L. Ed. 1317. In neither of these cases did the Court pass on the question of whether or not a reasonably applied separation of the races was not necessary for preserving peace and order.

It is respectfully submitted that relationship between the races in the State of South Carolina is harmonious today by reason of the separation of the races on the basis provided by the statutes quoted at pages 17 through 19 in Appellant's Jurisdictional Statement.

There is certainly no discrimination in the type of facilities offered. All passengers of both races ride in the same undivided bus, equipped with the same type of accommodations, the only distinction being the place on the bus at which one race or the other takes its seat.

To overrule the law of South Carolina, based on its customs and traditions, would materially affect the peace and tranquillity presently existing, and it is respectfully submitted that under our constitutional form of Government, whereby rights of the State are preserved for the purpose of preserving peace and good order, it is within the right of the State of South Carolina to prescribe reasonable restrictions in order to maintain such peace and tranquillity. It is recognized that these rights may not

usurp the Constitution, however, in instances such as this, it cannot be said that enforcing the reasonable regulations hereby attacked denies this appellee of equal protection of the laws or of due process of law.

In conclusion, we would call to the Court's attention the fact that it is necessary that the drivers, conductors or operators of public conveyances should be cloaked with police powers in order to enforce peace and good order on the public conveyances and to have the authority to arrest violators who are disturbing the peace. This is necessary irrespective of the question of separation of the races. As a further example, we would cite the statutes of the State of South Carolina with regard to the appointing of railroad conductors and station agents as policemen for the purpose of preserving peace within their respective trains and places of business. See Sections 58-1221 through 58-1223, Code of Laws of South Carolina, 1952, Appendix A.

Having lived with the bi-racial problems for the past ninety years, both races in this State know that they have made steady progress in solving the many complex problems which did exist between the races. Good will and a feeling of cooperation has existed between the races in South Carolina, and every effort has been made to give both races opportunities to develop economically, socially, politically and educationally. Left undisturbed, all bi-racial problems would have been solved to the satisfaction and happiness of both races.

The program of South Carolina, designed to equalize facilities in every field of operation and to build feeling of good will between the races, has been nullified by agitators from without the borders of this State. As a result of outside interference and the program of hate and vituperation directed to this State by those who know nothing of the conditions actually existing, have done both races irrepara-

ble damage which it will probably take another century to overcome.

Conditions cannot be improved by having courts strike down statutory law, practices and customs of this State which have been developed over the years for the sole purpose of preserving harmony and peaceful relations, at the same time guaranteeing to everyone his constitutional right in the pursuit of happiness on a voluntary basis rather than as a result of a condition forced upon them by decrees of any court, state or Federal.

Conditions cannot be improved by forcing upon the races a line of conduct contrary to the wishes and best interest of both races. Because of the gravity of the situation as above indicated, the Court should deny the Motion to Affirm and permit full argument on the merits of the case.

CONCLUSION

It is respectfully submitted that the laws of the State of South Carolina herein attacked should be upheld. It is further respectfully submitted that the appeal herein sought should be allowed and the relief sought by Appellant be granted.

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